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No. 9295

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIE HUNG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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ARGUMENT.

The record establishes (T. 114-156) that appellant twice sold concealed smoking opium in violation of the Jones-Miller and Harrison Narcotic Acts (21 U.S.C. 174; 26 U.S.C. 1043, 1047). That the indictment properly charges the two separate offenses alleged (T. 1-2), is not questioned (Fiddelke v. United States (C.C.A. 9), 47 F.(2d) 751).

Circumstances, inconsistent with innocence, prove that on April 25, 1939, appellant sold a five-tael tin of smoking opium to an informer in the doorway of 1019 Grant Avenue in San Francisco's Chinatown (T. 121-124). Subsequently on May 11, 1939, appellant was seen to receive currency from, and deliver smoking opium concealed in a five-tael tin to, the same in-

former in the rear of a restaurant at 640 Jackson Street in San Francisco's Chinatown (T. 149-150).

The facts being substantially as summarized, we need be concerned solely with the assignments of error, which, when examined, reveal that no error, prejudicial or otherwise, has been committed affecting the substantial rights of appellant and appellant's conviction should be affirmed (28 U.S.C. 391; Salerno v. United States (C.C.A. 8), 61 F.(2d) 419, 424).

I.

NO ERROR WAS COMMITTED IN DENYING MOTIONS FOR DIRECTED VERDICTS.

After repeating well recognized general principles establishing that a conviction is improper where based on mere suspicion, inference, presumption or circumstances consistent with innocence, appellant contends that the judgment of conviction should be reversed as to both counts of the indictment (T. 1-2) because of the insufficiency of the evidence. Failure of the Court to grant motions for directed verdicts is assigned as error (Assignments of Error I-VIII). We urge that no error was committed in denying such motions.

In Count One of the indictment (T. 1), appellant is charged with unlawfully selling, dispensing and distributing, not in or from the original stamped package, a five-tael tin of smoking opium at San Francisco on April 25, 1939, in violation of the Harrison

Narcotic Act (26 U.S.C. 1043, 1047). In support of this charge the government proved that on April 25, 1939, after thoroughly searching an informer and finding no narcotic drugs on his person, he was supplied $180.00 (T. 121). Keeping the informer under constant observation, he was seen to contact no one thereafter except appellant, with whom he held conversations, subsequently meeting and conversing with appellant in the doorway of 1019 Grant Avenue in San Francisco's Chinatown (T. 121-123). Agent Lachenauer, who was standing on the opposite side of the narrow avenue (T. 140-142, 192) described what took place in the doorway, as follows (T. 122-124, 128):

> "The informer went in 1019 Grant Avenue and stood near the front of the door. It was maybe five or ten minutes later that the defendant, Louie Hung walked in there, and I could see them together. They were close together, I should say within arm's reach. They talked about three or four minutes and the informer came out."
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> * * * * * * *
>
> "I followed the informer to about the vicinity of where we dropped him off at Washington and Montgomery Streets. There the informer gave me a package wrapped in Chinese newspaper. *I did not see anybody contact the informer from the time I searched him and gave him the $180 in the narcotic office, until he gave me the package after I saw him in conversation with the defendant in the restaurant.* I did not see anyone other than the defendant contact the informer as far as I was able to see. *The informer was under my observation during the full interval of time.* The

five tael-tin of smoking opium, marked Government's Exhibit 1 for identification, is the package that the informer gave me." (Italics ours.)

* * * * * * *

"On both April 25 and May 11 I searched the informer when we got back to the office and he had no money on him, with the exception of his personal funds. He had none of the identified money I had previously given him."

In Count Two of the indictment (T. 2), appellant is charged with fraudulently and knowingly concealing and facilitating the concealment of a five-tael tin of smoking opium at San Francisco on May 11, 1939, in violation of the Jones-Miller Act (21 U.S.C. 174). In support of this charge the government proved that on May 11, 1939, after thoroughly searching an informer and finding no narcotic drugs on his person, he was supplied with $190.00 (T. 125). The informer was seen to converse with appellant in a restaurant at 640 Jackson Street in San Francisco's Chinatown, after which appellant was seen to receive currency from, and deliver a package containing the smoking opium to the informer. Agent Joroslow, who witnessed this sale, described what took place in the restaurant, as follows (T. 149-151):

"The informer was seated in the booth. At about 6:35, about five minutes after I entered, the defendant Louie Hung entered and sat down at the table across from the informer."

* * * * * * *

"The defendant and the informer held a short conversation, then both arose and proceeded to-

> ward the rear of the premises. I waited a very short while and then followed them. * * * As I came into a long hall which leads to a men's toilet in the rear of the premises I saw the informer standing in the hall facing the defendant, he was standing on the threshold of the doorway leading into the men's toilet. * * * I saw the informer give the defendant currency. I saw the defendant count the currency. He thumbed it and went through it and I continued down the hall slowly until I came to within about fifteen feet of them and I saw the defendant give the informer a five-tael tin of opium, smoking opium, wrapped in paper, just ordinary tissue paper."
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> * * * * * * *
>
> "I followed the informer and the defendant out of the premises. I then followed the informer down Jackson Street to a hallway just off Jackson Street on Columbus Avenue and there Agent Lachenauer stepped into the hallway with the informer under my observation and received from the informer the same five-tael can of opium that I had seen pass earlier."

Appellant then took the stand and testified that he had met an old acquaintance on those two occasions who sought to buy narcotics from him (T. 207-211). Appellant denied having made the sales, although he disclosed a knowledge of smoking opium (T. 131-133, 208-215, 235-239).

By their verdict, reached after deliberating approximately an hour, the jury rejected appellant's denial of guilt and weighed the evidence in favor of the government (T. 6).

We submit that appellant's conviction is supported by evidence sufficient to make a case for the jury and therefore no error was committed in denying motions for directed verdicts.

Foster v. United States (C.C.A. 9), 11 F.(2d) 100, 101;

Borgfeldt v. United States (C.C.A. 9), 67 F. (2d) 967;

Maugeri v. United States (C.C.A. 9), 80 F.(2d) 199, 202;

Mullaney v. United States (C.C.A. 9), 82 F. (2d) 638, 640;

Lee Dip v. United States (C.C.A. 9), 92 F.(2d) 802, 803.

II.

THE DEFENSE OF ENTRAPMENT WAS UNAVAILABLE.

Appellant urges the defense of entrapment (Assignments of Error I-VIII) although no mention of entrapment was made until both sides had rested. Then in support of a renewal of appellant's motions for directed verdicts, counsel stated as an afterthought (T. 240-241):

> "I also add to both grounds that the evidence discloses on the part of the Government that the Government entered into an entrapment to induce and coerce this defendant into the commission of a public offense."

The motion was denied as made (T. 241) and, after appellant's counsel had referred to the matter during

argument, the Court instructed the jury on the defense of entrapment as follows (T. 243, 247-249):

"The Court. It now becomes the duty of the court to instruct the jury on the law of this case. It becomes the duty of the jury to apply the law that is given to them to the facts before them. The jury are the sole judges of the fact. It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof together, and to accept such instructions as correct statements of the law involved.

"In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such act. It does not also require a knowledge that such act is a violation of law."

* * * * * * *

"I instruct you that it is unlawful for a public official or any person to induce a man to commit a crime in order to get a conviction. The courts will not lend aid or encouragement to officials or any other person who may, even under a mistaken sense of duty, encourage or induce or assist parties to commit crime, in order that they may arrest and have them punished for so doing. Accordingly, where the scheme or plan to commit the crime does not originate with the defendant and he is induced or encouraged or lured to commit the offenses charged by an officer of the law, or one acting to assist him, such as the informer in this case, the defendant cannot be held for the offenses charged, for, in contemplation of law, no crime has in fact been committed.

"I further instruct you, in this connection, that if you find from all the evidence in the case, including the testimony of the defendant, that he was induced, or incited, or encouraged by the informer, or anyone else to commit the two offenses set out in the indictment on April 25, 1939, and May 11, 1939, respectively, provided you should first find from all the evidence and beyond a reasonable doubt that the defendant actually committed said two offenses, it is your duty, under the law of entrapment as I have explained to you, to find the defendant not guilty; or, if you entertain a reasonable doubt as to whether the defendant was entrapped by the informer to commit the two offenses set out in the indictment, it is your duty to give the defendant the benefit of that reasonable doubt and to acquit him.

"Where the officers of the law have incited a person to commit the crime charged, and lured him into its commission for the purpose of arresting him, the law will not authorize a verdict of guilt. But if the intent and purpose to violate the law are present, the mere fact that public officers furnished the opportunity to commit the crime is no defense. The Government is not engaged in the business of manufacturing criminals. It has enough to do to prevent the commission of crime. But it often becomes necessary for detectives and narcotic officers to match their wits against the wits of men who are violating the law, or have violated the law, and in such cases officers may offer the criminal an opportunity to commit the crime.

"The determination of a charge in a criminal case involves the proof of two distinct propositions; first, that the crime charged or one included

> therein, was committed; the second, that it was committed by the person accused thereof, and on trial therefor; and these two propositions and every essential and material factor necessary to them or to either of them must be established by the case to a moral certainty and beyond a reasonable doubt."

The jury's verdict, rendered in light of the foregoing instructions, reveals that the jury rejected appellant's last minute attempt to clothe himself with the defense of entrapment. Tested by the record, this was a proper verdict and, as a matter of law, disposes of such defense.

However, so that there will be no misunderstanding, we refer this Court to testimony which discloses that appellant was merely given the opportunity through the instrumentality of an informer to violate the law (T. 119-169). This activity constituted lawful law enforcement (Sorrells v. United States, 287 U. S. 435, 441, et seq.). Since the government's case itself is devoid of evidence of entrapment, it is significant that appellant denied guilt and also offered no testimony in support of the claimed defense of entrapment. As to the first transaction of April 25, 1939, appellant testified on direct examination (T. 207-208):

> "He asked me to purchase some narcotics from me. I says 'I am not in the business, I am afraid of them'. I made some remarks at him and I left. I did not give Mr. Lim any opium on that occasion."

As to the second transaction of May 11, 1939, appellant testified on direct examination (T. 208):

> "I eventually met Mr. Lim there in the restaurant at 640 Jackson Street and had a conversation with him in one of the booths in the restaurant proper, consisting of a few words. There were a lot of people around the counter but Mr. Lim and myself were the only ones sitting at the table. He asked me to sell him some dope again. I got mad and I scold him with some Chinese words. I did not give him any opium on that occasion."

This denial of guilt was persistently reiterated on cross-examination of appellant (T. 210-218). Without burdening the Court with a needless multiplication of authorities, suffice it to quote from the recent case of United States v. Ginsburg (C.C.A. 7), 96 F.(2d) 882, where the Court said at page 886:

> "It is also to be noted that appellant made no defense of entrapment in the District Court, tendered no instructions on that question, and made no objections that none were given upon that subject. His sole defense was that he did not sell the drug, and at no time had it in his possession, or aided in concealing it. Under these circumstances the contention is not tenable."

However, although appellant offered no defense of entrapment and only mentioned it as an afterthought in appellant's motions for directed verdicts at the termination of the case, out of an abundance of caution, the Court instructed the jury fully on this subject, as hereinabove quoted, a conviction resulting. We have no quarrel with the general principles of entrapment, quoted from authorities consuming fifteen pages of appellant's brief, and we do not hesitate to

adopt such quotations as illustrating our contention that the defense of entrapment has, as a matter of law, no place in this case. This Court has recently commented on this problem in Ratigan v. United States, 88 F.(2d) 919, at page 922:

> "As to group (c) of the assigned errors, there is no entrapment in this case. The defendant was not led into a situation where he committed the act on motive or purpose of innocence on his part, or by promise of 'stool pigeons' by display of purported authority that the defendant would not be prosecuted, or upon such display of authority that the sale was no offense; all that was done by the stool pigeons was presenting themselves to the defendant and soliciting the drug. There was no decoy solicitation, or conduct. What the defendant did was his free voluntary act. The 'stool pigeons' merely placed themselves in the way and afforded opportunity to purchase the drug."

We submit that since the record indicates that the government merely offered to buy smoking opium which appellant was ready to sell, the defense of entrapment was unavailable (Perez v. United States (C.C.A. 9), 10 F.(2d) 352, 353), particularly upon appellant's repetitious and express denial of having made such sales.

III.

NO ERROR WAS COMMITTED BY REFUSAL OF THE COURT TO PERMIT JURY TO INSPECT THE HALLWAY AT 640 JACKSON STREET.

Appellant contends that refusal of the Court to permit the jury to inspect the hallway at 640 Jackson Street, the scene of the second transaction of May 11, 1939, constituted reversible error (Assignments of Error LV, LXXVII). This contention is obviously unsound as to the first count of the indictment and equally unsound as to the second count because the hallway was materially altered after the offense occurred and before the trial commenced (T. 1-2, 169-170, 173, 199) and therefore an inspection thereof by the jury would have been improper.

Three persons were present on May 11, 1939, when appellant sold a five-tael tin of smoking opium in the hallway of 640 Jackson Street in San Francisco's Chinatown. They were the informer, appellant and Federal Narcotic Agent I. Jerry Joroslow. Two of these three persons testified. Appellant swore under oath that he was not present, stating (T. 209):

> "On that occasion Mr. Lim and myself did not go in any other part of the premises at all other than the main portion of the dining room, Mr. Lim was sitting at a table and I sat down with him for a few minutes and then left. I did not walk down the passageway or corridor leading to the men's toilet in the premises at 640 Jackson as shown as Defendant's Exhibit C and likewise on Defendant's Exhibit E on the 11th day of May, 1939 with Mr. Lim. I did not at any time give

> Mr. Lim any opium. Mr. Lim did not at any time give me any money of any sum whatsoever for the purchase of opium or for any other purpose."

Agent Joroslow, whose credibility was unshaken, testified that he witnessed appellant sell the smoking opium in the hallway, stating (T. 150):

> "The defendant and the informer held a short conversation, then both arose and proceeded toward the rear of the premises. I waited a very short while and then followed them. * * * As I came into a long hall which leads to a men's toilet in the rear of the premises I saw the informer standing in the hall facing the defendant, he was standing on the threshhold of the doorway leading into the men's toilet. * * * I saw the informer give the defendant currency. I saw the defendant count the currency. He thumbed it and went through it and I continued down the hall slowly until I came to within about fifteen feet of them and I saw the defendant give the informer a five-tael tin of opium, smoking opium, wrapped in paper, just ordinary tissue paper."

On cross-examination, Agent Joroslow was confronted with photographs and diagrams of the rear of the premises in 640 Jackson Street produced by appellant and prepared from measurements taken on August 26, 1939, and September 6, 1939 (T. 187), about three and one-half months after appellant was alleged to have sold the smoking opium on May 11, 1939, and during which time the premises in question were altered. Agent Joroslow's reactions to the photographs and maps were that they resembled that portion of

the premises "somewhat" (T. 160), that they seemed to be "out of scale" (T. 160), that they did not seem to be "entirely correct" (T. 161), that they did not appear to be "accurate" (T. 167), and that they did not appear to "represent" the premises (T. 168). The following then took place after adjournment and upon reconvening Court the following day (T. 169-170):

"Redirect Examination.

Mr. Murman. Q. Mr. Joroslow, recalling your mind to the testimony given in connection with this diagram and the picture shown to you by counsel yesterday, in which you stated, if I recall correctly, that they did not look the same to you; did you at my suggestion go up and view the premises last evening and this morning?

A. I did.

Q. Will you state to the court whether or not your observation tallies with your recollection as to the appearance of the premises at the time you observed the transaction which is the subject of the second count of this indictment?

A. It does not.

Q. What differences did you note?

A. I noted that the repainting job had been done.

Q. What portion of the premises had been repainted?

A. The rear wall and some of the doors.

Q. That is the portion that is referred to on this diagram furnished by the defense relating to the men's washroom and hall?

A. That is correct.

Q. What else had been done that you noticed?

A. Some part of the floor had been changed. I don't know exactly what the change is, but it has been changed to a new substance.

Q. Did the portion of the premises in dispute look the same to you at the time you observed them last night and this morning as they did at the time of the narcotic transaction in question?

A. They did not."

Subsequently, appellant produced his friend Chin Pack, who was the owner and cashier at the restaurant at 640 Jackson Street and whom appellant later testified he had known for several years (T. 217), who swore falsely that he did not know appellant or had not talked with appellant on May 11, 1939 (T. 126, 199-200, 230-231), and who stated that, although painting and patching had occurred, the premises had not been altered although the number of boxes and cartons piled in the hallway varied from day to day (T. 199). On cross-examination, Chin Pack did not say he had employed painters, but stated that he had employed one or two carpenters "more or less" for "four days" to work "in the hallway and back further in the toilet" as well as in the front part of the restaurant (T. 199).

To summarize, appellant denied selling smoking opium as witnessed by Agent Joroslow on May 11, 1939, the scene of the crime being thereafter renovated to appear materially different to Agent Joroslow. How a jury could have been aided in reaching their verdict by improperly viewing the premises as altered is beyond our comprehension. And yet appellant urges

that the refusal of the Court to permit the jury to inspect such premises under such circumstances constituted reversible error. All the authorities cited by appellant appear to us to point out that the object of a view by the jury of the scene of the crime is to acquaint the jury with the physical conditions as they existed when the crime was committed. We concede that the exact conditions are not required. But materially altered physical surroundings are as untrustworthy as perjured testimony because like such testimony they do not reflect the truth and have no place in the case. Because the law is well settled on the question of permitting the jury to view the premises and because we have no quarrel with the general principles enunciated by appellant's authorities, we cite 64 C. J. 89, where the rule is succinctly restated:

> "It is ordinarily proper to refuse to permit a view where changes have taken place since the time to which the action relates, or where it is not shown that the conditions are the same; but a view may be granted, even though some of the conditions have changed, if the change is not material, or if the character and extent of such changes are properly brought out in the evidence, and a change of some of the conditions does not make a view improper where the conditions in question in the action have not changed, or where the changes have resulted from the act or omission upon which the action is based."

Assuming for purposes of argument that the changes in the hallway at 640 Jackson Street were not material and were properly brought out in evi-

dence, it is discretionary with the Court to permit the jury to view the premises (Section 1119, California Penal Code) and a refusal to grant such permission does not constitute error unless the Court has abused its discretion. In this case, the Court permitted appellant to fully examine the witnesses as to their knowledge of the premises. Photographs and maps were introduced in evidence by appellant. Upon denying appellant's request to permit the jury to view the altered premises, the Court said, and the record bears out the Court's statement (T. 228):

> "The Court. I think we have spent considerable time in describing the premises; we have diagrams and photographs of the premises and I think it is sufficient for all purposes in this case."

Again because the law is well settled on this question of the Court's discretion, we cite 64 C. J. 87, where the rule is succinctly restated:

> "At common law, the judge before whom the trial of an action is pending has discretion, not subject to review unless abused, to permit or refuse to permit the jury to view and inspect the premises or place or an article or object involved in the action; and the same is true under statutes authorizing the court to permit or direct a view when it is deemed proper or necessary."

Whether or not the Court abused its discretion turns on whether a view of the premises would aid the jury in reaching a verdict. At 64 C. J. 88 the law is restated on this approved test:

> "As a general principle, a view or inspection should be granted only where it is reasonably

> certain that it will be of substantial aid to the jury in reaching a correct verdict, and the court may refuse to allow a view where it does not appear that the jury would be materially assisted thereby, or where they are already familiar with the premises involved, or where photographs, diagrams, or maps in evidence adequately present the situation, or where the jury does not feel that a view would be helpful or of benefit to them."

Here, as the record discloses, testimony had familiarized the jury with the premises as they appeared on May 11, 1939, the day of the alleged offense contained in the second count of the indictment. Photographs, diagrams and maps were in evidence. Contrary to appellant's statement, the jury expressed no desire to view the premises at the time appellant brought up the matter. A question, entirely innocuous as revealing doubt on this subject, was directed to the Court during the final argument of the government and, particularly at this stage of the proceedings, the Court properly answered that the jury was to act on the testimony before it (T. 242-243).

If a true conflict in the evidence existed on this subject, it was resolved by the verdict of guilty rendered after appellant's denial of ever having been in the hallway where Agent Joroslow saw appellant sell the smoking opium on May 11, 1939. The real issue, however, is not the condition of the premises, but appellant's guilt on Count Two of the indictment. This Court, not being concerned with the weight of evidence, and having in mind that harmless error, if any, does not require a reversal (28 U.S.C. 391),

should not now look behind a proper verdict supported by convincing evidence of appellant's guilt to pass upon the discretion of the trial Court lawfully invoked.

We submit that no error was committed by refusal of the Court to permit the jury to inspect the hallway at 640 Jackson Street.

IV.

NO ERROR WAS COMMITTED IN ADMITTING EVIDENCE AS TO WHAT TRANSPIRED AT TIME OF APPELLANT'S ARREST.

Appellant contends that admitting evidence as to what transpired at the time of appellant's arrest constituted reversible error (Assignments of Error IX-XXVIII). This contention ignores the sequence of testimony introduced in the following manner. Having already proved that appellant sold a five-tael tin of concealed smoking opium on two occasions (T. 121-128; 149-150), the *government's* case merely showed in addition that appellant met and conversed with the informer on May 29, 1939, after the informer had been searched and given $200.00 to buy more smoking opium. Appellant was then arrested and searched (T. 128-130). Keys taken from appellant opened the door to Apartment 404 at 730 Washington Street. Appellant then admitted he was living there with another man. With appellant's consent, the agents searched the apartment (T. 131-134).

Appellant then took the stand in his own defense and not only did not deny being arrested, but also testified on *direct* examination that during April and May he was living in the apartment in question with a cousin (T. 210). On *cross-examination* appellant did deny that the apartment contained fumes of opium at the time of the search, stating in addition that his cousin's name was Louis Guey, that he did not know whether his cousin smoked opium or not, and that he had not seen his cousin in the apartment on the day of his, appellant's, arrest until after the agents finished searching his apartment (T. 214, 218-225).

In *rebuttal* the government proved that fumes of smoking opium were present during the search and that appellant explained the presence of such fumes by stating that although he did not smoke, "maybe" Louis Guey smoked. Louis Guey was then detained as he let himself into the apartment with a key (T. 232-239).

The Court properly received the evidence hereinabove summarized, particularly in the sequence presented. In 16 C. J. 553, the general rule is set forth as follows:

> "It is proper to admit evidence of the arrest of accused and the attending circumstances, including the place of arrest, the persons then in the company of accused, the acts and conduct of accused, his declarations, his resistance of arrest, and an attempt on his part to evade, escape, or avoid arrest.

This rule has been applied by this Court on numerous occasions, representative of which is the succinct statement of Judge Gilbert speaking on behalf of this Court in Gray v. United States, 9 F.(2d) 337 at page 340:

> "And it is the general rule in all courts that in criminal trials the conduct of the accused at the time of his arrest may go in evidence to the jury as a means of establishing his guilt."

An excellent statement of the law on this question is found in People v. Winthrop, 118 Cal. 85, where Judge Van Fleet, late of ~~this~~ THE LOWER Court, speaking for the Supreme Court of the State of California, said at page 91:

> "Nor was there any error in admitting evidence of the circumstances attending defendant's arrest, including his declarations at the time, or in permitting the prosecution to introduce the various articles taken from his person. This evidence showed that when arrested, shortly after the commission of the offense, defendant was apparently hiding in the city of Oakland away from the place of his residence; that he was in disguise, and passing under an assumed name, and denied his identity to the arresting officer; that among the articles found upon his person were several newspaper clippings containing accounts of the robbery and a recently purchased railroad ticket from Oakland to Mojave. Such evidence is always admitted as having a tendency greater or less, according to the circumstances, to establish guilt."

We submit that admitting evidence as to what transpired at the time of appellant's arrest was proper, particularly in view of the manner in which such evidence was presented to the jury; first, as part of the government's case in chief; second, by appellant's testimony; third, by government's rebuttal.

Appellant criticizes the Assistant United States Attorney for saying in his opening statement that a "third transaction was in progress" when he referred to the circumstances preceding appellant's arrest on May 29, 1939 (T. 113). The record supports this statement by evidence subsequently introduced (Malone v. United States (C.C.A. 7), 94 F.(2d) 281, 288), although the third transaction was never consummated (T. 128-130). Furthermore, no matter what counsel's interpretation of the evidence may have been, the Court prevented error, if any, by leaving no doubt in the minds of the jurors on this subject in the instructions (T. 251-252):

> "The court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their argument, the presentations as to what the facts have been or are to be proved, and if there is a variance between the two, you must, in arriving at your verdict, to the extent that there is such a variance, consider only the facts testified to by the witnesses, and to remember that statements of counsel in their arguments or presentations are not evidence in the case. If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such

statements as evidence but you must look entirely to the proof in ascertaining what the facts are."

We submit that no error was committed by the particular reference made by the prosecutor to evidence subsequently introduced in connection with appellant's arrest.

Next appellant criticizes testimony as to the presence of fumes of smoking opium in the apartment at 730 Washington Street (T. 232, et seq). In this connection the sequence of testimony must be borne in mind in that such testimony was offered in rebuttal of appellant's denial on cross-examination that the apartment in which, on direct examination, he testified he was living with his cousin Louis Guey at the time of his, appellant's arrest, contained such fumes (T. 210, 214-215).

It is undisputed that a reasonably full cross-examination of a witness as to previous testimony and, when necessary, as to demeanor on the stand is the right, not merely the privilege, of the adverse party, and as a rule a denial of this right is error (Smith v. United States (C.C.A. 9), 10 F.(2d) 787, 788). It is only after the right has been substantially exercised that the allowance of further cross-examination becomes discretionary (Cossack v. United States (C. C.A. 9), 63 F.(2d) 511, 516; Arnold v. United States (C.C.A. 10), 94 F.(2d) 499, 506). The discretion of the Judge of the lower Court, who because he is the trial Judge is necessarily privileged over this Court

to view the demeanor of the witnesses as they testify, largely determines the scope of cross-examination, particularly in testing the credibility and good faith of the witness (Sawyear v. United States (C.C.A. 9), 27 F.(2d) 569, 570; Maryland Casualty Co. v. Dunlap (C.C.A. 1), 68 F.(2d) 289, 293).

Likewise, in order to elicit material facts bearing upon the credibility of the witness, the Courts have permitted cross-examination as to the witness' occupation and the environment in which he chooses to live (Sawyear v. United States, supra, 570), as to past addiction to morphine (Chicago & N. W. Ry. Co. v. McKenna (C.C.A. 8), 74 F.(2d) 155, 158), as to prior association with other persons charged with a similar offense in a separate indictment (Blockburger v. United States (C.C.A. 7), 50 F.(2d) 795, 798; affirmed, 284 U.S. 299, 304), as to a separate although related, pending criminal prosecution of the witness (Urban v. United States (C.C.A. 10), 46 F.(2d) 291, 293), or as to previous conviction for misdemeanor where the witness had denied such misconduct (United States v. Liddy (D.C. Pa.), 2 F.(2d) 60, 61; cited with approval in Merrill v. United States (C.C.A. 9), 6 F.(2d) 120, 121).

We submit that the cross-examination, eliciting appellant's denial of the presence of fumes of smoking opium in the place where he stated he lived, being proper (Paine v. United States (C.C.A. 9), 7 F.(2d) 263, 265), rebuttal of such denial was proper and material under the facts of this case, and the Court's rulings permitting the introduction of such rebuttal

testimony did not therefore constitute error, there being no showing of an abuse of discretion (16 C. J. 867).

No problem is presented herein of irrelevant evidence, introduced as not tending to prove or disprove the issues of this case, as treated by the cases cited by appellant. We have demonstrated from the record that the evidence criticized was material in the sequence presented and as tested by the authorities cited. We submit that no error was committed in admitting evidence as to what transpired at the time of appellant's arrest.

V.

NO ERROR WAS COMMITTED BY ACTIONS OF PROSECUTING ATTORNEY AND BY RULINGS OF COURT THEREON.

Appellant contends that actions of the prosecuting attorney constituted misconduct and rulings of the Court thereon were erroneous (Assignments of Error IX, X, XLII, LX, LXXVI). This contention stems from appellant's further contention that admitting evidence as to what transpired at the time of the arrest of appellant constituted reversible error. In view of the fact that we have considered the question of alleged misconduct and the Court's rulings thereon in demonstrating that no error was committed by admitting such evidence (see IV, supra), we submit that the record discloses that no error was committed by actions of the prosecuting attorney in connection therewith and by rulings of the Court thereon.

VI.

NO ERROR WAS COMMITTED BY THE COURT IN INSTRUCTING THE JURY.

Appellant contends that the refusal of the Court to instruct the jury as requested constituted reversible error, particularly in light of the charge actually given and excepted to by appellant (Assignments of Error LXXVIII-LXXXVIII).

Having already established that the evidence is sufficient to support appellant's guilt (see I, supra), no error was committed in refusing to instruct the jury to find appellant not guilty on each and every charge contained in the indictment (Assignments of Error LXXVIII-LXXX).

Next appellant attacks the Court's instructions as to the offense alleged in the second count of the indictment (T. 2). In this connection, the Court charged the jury as follows (T. 243-247, 251):

> "The Court. It now becomes the duty of the court to instruct the jury on the law of this case. It becomes the duty of the jury to apply the law that is given to them to the facts before them. The jury are the sole judges of the fact. It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof together, and to accept such instructions as correct statements of the law involved."
>
> * * * * * * *
>
> "You are further instructed that said defendant is charged in count two of the indictment with having unlawfully concealed and facilitated the concealment of a quantity of smoking opium on

May 11, 1939, in violation of Section 2c of the Jones-Miller Act."

* * * * * * *

"You are instructed that any person who conceals or in any manner facilitates the concealment of smoking opium, knowing the same to have been brought into the United States contrary to law, is guilty of a felony.

"The law provides that the term 'narcotic drug' shall include any preparation of opium, and you will recall from the testimony in this case that the chemist testified that smoking opium is a preparation of opium.

"The law further provides that when on trial for concealing or facilitating the concealment of smoking opium, the defendant is shown to have had possession of such smoking opium, such possession shall be deemed sufficient evidence to authorize the defendant's conviction unless the defendant explains his possession to your satisfaction.

"Therefore, if you are convinced from the evidence, to a moral certainty and beyond a reasonable doubt, as I have defined these terms, that smoking opium is in fact a preparation of opium and that the defendant now on trial had smoking opium in his possession on the occasions charged in the indictment, and concealed, or in any manner facilitated the concealment of such smoking opium, as also charged in the second count of the indictment, you will find the defendant guilty unless he has explained his possession of the smoking opium to your satisfaction.

"The second count of the indictment charges the defendant with the unlawful concealing and

facilitating the concealment of the smoking opium in question. I charge you that the mere concealing or facilitating the concealment of the smoking opium in question is insufficient upon which to justify your finding the defendant guilty of this count. Before the defendant can be found guilty you must further find from the evidence beyond a reasonable doubt, that said opium had been previously fraudulently imported into the United States.

"With reference to the word 'facilitates,' as used in the statute involved in this proceeding, I instruct you that under the law in order to facilitate the transportation or concealment of the opium it is necessary before you can find the defendant guilty of either of these offenses that the evidence establishes beyond a reasonable doubt that the defendant committed some act or acts resulting in the actual facilitation of the transportation or concealment of the opium in question.

"Mere knowledge upon the part of the defendant that the opium in question had been unlawfully imported into the United States is not sufficient to sustain the guilt of the defendant of any of the charges contained in the indictment.

"The defendant cannot be found guilty of any of the offenses charged in the indictment merely because he had conceived an intention to commit any of such offenses. Before you can return a verdict of guilty of all or any of such charges you must first find that the defendant did actually commit some act or acts resulting in the commission of the offense and offenses charged in the indictment. A mere evil intention to commit such offense or offenses is not sufficient.

"I instruct you that in a criminal proceeding there is only one presumption, and that is the presumption of innocence, which overcomes all other presumptions tending to establish the guilt of the accused. I therefore instruct you that you are not to infer or presume the guilt of the defendant from any fact or facts established by the evidence which do not in themselves establish the guilt of the defendant in your minds beyond a reasonable doubt.

"I instruct you that the defendant is presumed innocent and that that presumption prevails until evidence has been received which from a probative standpoint establishes the guilt of the defendant to your satisfaction beyond a reasonable doubt."

* * * * * * *

"You are not bound to decide in conformity with the declarations of any number of witnesses who do not produce a conviction in your mind, against a less number of other evidence satisfying your mind."

Inasmuch as Agent Joroslow had testified to facts proving that appellant had possession of the five-tael tin of smoking opium concealed by him as charged in the second count of the indictment (T. 150) and since appellant had not explained such possession but chose to flatly contradict Agent Joroslow (T. 208-215), it is clear that the jury was fully instructed on the law so as to resolve this conflict in the evidence in favor of the prosecution. It should also be noted that Section 180 of Title 21 U.S.C. provides in part:

"No smoking opium or opium prepared for smoking shall be admitted into the United States

(for certain purposes) * * * or for any other purpose; * * * ." (Parentheses ours)

Section 181 of Title 21 U.S.C. provides in part:

"All smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported contrary to law, * * * ."

Furthermore, since the Courts have taken judicial notice of smoking opium's foreign origin (United States v. Yee Fing (D. C. Mont.), 222 F. 154, 156; United States v. Sam Chin (D. C. Md.), 24 F. Supp. 14, 19), we submit that no error was committed by the Court in refusing to give appellant's proposed instructions Nos. 4, 5 and 6 (Assignments of Error LXXXI-LXXXIII).

Rather than refusing to give appellant's instruction No. 8 (Assignment of Error LXXXV), the Court gave the same in full as hereinabove quoted (T. 246). Therefore this alleged assignment of error is frivolous.

Next appellant attacks the Court's instructions as to the offense alleged in the first count of the indictment (T. 1). In this connection, the Court charged the jury as follows (T. 244-245):

"You are instructed that the defendant is charged in count one of the indictment with having unlawfully sold a quantity of smoking opium, not in or from the original stamped package, on April 25, 1939, in violation of Section 1 of the Harrison Narcotic Act.

* * * * * * *

"I instruct you that it is unlawful for any person to sell smoking opium except in or from the original stamped package.

"In this connection, you are instructed that the Harrison Narcotic Act provides that proof by the government of the absence of appropriate tax paid stamps from the packages containing the smoking opium in question is sufficient to place the burden upon the defendant, proved to be in possession of the smoking opium, of establishing the fact that such smoking opium was actually sold, dispensed or distributed in or from a package bearing the proper internal revenue stamps.

"Thus the absence of appropriate tax paid stamps from any package containing smoking opium which is sold, dispensed or distributed by the defendant, or in which he aided or abetted, is prima facie evidence of a violation of the Harrison Narcotic Act by the person possessing such package."

Appellant cites no authority for his novel but groundless contention that the above quoted instruction is erroneous because there is no law which provides for appropriate tax paid stamps on smoking opium or containers thereof. Aside from the innumerable decisions stemming from Wong Lung Sing v. United States (C.C.A. 9), 3 F.(2d) 780, 781, approving the form of the charge in the first count of the indictment, an examination of the Harrison Narcotic Act clearly shows that such stamps are to be affixed to the tin of the smoking opium in question. Section 1040 of Title 26 U.S.C. provides in part:

"(a) There shall be levied, assessed, collected and paid upon opium, * * * any * * * preparation thereof, * * * imported into the United States, and sold, * * * an internal revenue tax * * *."

* * * * * * *

"(c) (1) The tax imposed by subsection (a) shall be represented by appropriate stamps, * * *."

R. F. Love, the chemist, testified as to the contents of the five-tael tin of smoking opium involved in the first count of the indictment as follows (T. 115):

"I examined the contents of this can on June 24, 1939 and found the contents to be smoking opium, which is a preparation of gum opium."

Section 1042 (a) of Title 26 U.S.C. provides in part:

"The stamps provided in subsection (c) (1) of section 1040 shall be so affixed to the * * * container as to securely seal the stopper, covering, or wrapper thereof."

Section 1043 (a) of Title 26 U.S.C. provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 1040 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not regis-

tered and paid special taxes as required by sections 1383 and 1384 shall be prima facie evidence of liability to such special tax."

We submit that no error was committed by the Court in charging the jury as hereinabove quoted relative to the probative value of proof by the government of the absence of appropriate tax paid stamps from the tin of smoking opium in question (T. 115, 118, 120, 244).

For reasons already given, we submit that no error was committed by the Court in charging the jury as hereinabove quoted relative to the necessity of appellant explaining his possession of the smoking opium in question upon proof of such possession as furnished by Agent Joroslow (Assignment of Error LXXXVII).

Appellant's last assignment of error relates to that portion of the Court's instructions touching upon the failure of the informer to testify and the refusal of the government to disclose such informer's identity (Assignment of Error LXXXVIII). The instruction given by the Court on this subject reads as follows (T. 252-253):

"The Government is not obliged to produce in court an informer used to assist the Government in apprehending the defendant. Nor is the Government obliged to disclose the name of such informer. Such information may properly be kept a secret and no presumption arises on the Government upon its refusal to disclose such information. The law recognizes the duty of every citizen to communicate to the Government and the

> officers such information as he may have concerning the commission of offenses against the law, and for the purpose of encouraging the performance of that duty without fear of consequences the courts have long held that the Government cannot be compelled to disclose the names of persons by whom and to whom information has been given which led to the discovery of the offenses. Thus in such cases as the present one the Government agent called as a witness is not compelled to disclose the name of the informer."

In giving the instruction just quoted, the Court may have been relying upon the principle expressed in the early case of Vogel v. Gruaz, 110 U. S. 311, where at page 316 the Supreme Court said:

> "* * * it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

However, after citing the Vogel case, this Court speaking through Judge Rudkin held in Mitrovich v. United States, 15 F. (2d) 163:

> "A government witness testified that he saw the plaintiff in error at a desk inside the premises on

> May 2, 1925; that the place was pointed out to him by an informer. He was then asked the name of the informer, but an objection to the question was sustained and an exception allowed. In this ruling there was no error."

Furthermore, it must be borne in mind that the government is not required to produce all witnesses against the defendant (Love v. United States (C.C.A. 9), 74 F. (2d) 988, 989). We submit that no error was committed by the Court in instructing the jury.

VII.

NO ERROR WAS COMMITTED IN DENYING APPELLANT'S MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

Appellant contends that the Court erred in denying appellant's motions for new trial and in arrest of judgment (Assignments of Error V-VIII). The record discloses that on the facts, as tested by the authorities hereinabove cited, both motions were properly denied. Furthermore, both motions were addressed to the sound discretion of the Court which was not abused. We submit that no error was committed in denying appellant's motions for new trial and in arrest of judgment.

CONCLUSION.

It appearing from an examination of the authorities, that in light of the record, the government properly proved that appellant twice sold concealed smok-

ing opium in violation of the Jones-Miller and Harrison Narcotic Acts (21 U.S.C. 174; 26 U.S.C. 1043, 1047). No error, prejudicial or otherwise, having been committed affecting the substantial rights of appellant, appellant's conviction should be affirmed.

Dated, San Francisco,
March 18, 1940.

Respectfully submitted,

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